Recent Trust Cases 1993

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FOR THE FIRST TIME since beginning this review of Manitoba trust cases, there has been a reversal of a trusts decision which was included in a previous commentary.

The case in point is *Mehta Estate* v. *Mehta Estate*[1] which arose out of a claim by the husband's estate that a resulting trust should be declared in favour of that estate of certain guaranteed investment certificates and registered retirement savings plan assets which had been acquired in the wife's name out of the estate. The learned trial judge found, as a fact, that these assets had been purchased out of the husband's employment income. Before, however, there could be a presumption of a resulting trust, the husband's counsel had to rebut the presumption of advancement which applies in such cases between husband and wife. This he succeeded in doing, for the learned trial judge stated that there was no longer any such presumption in Manitoba. In our comment in the *1992 Annual Survey of Manitoba Law*[2], we pointed out that such a statement was not really accurate as Manitoba was one of the four Canadian provinces where there had been no legislative abolition of this presumption.

The Court of Appeal has now taken up this point and emphasized that the presumption of advancement between husband and wife is still in effect in Manitoba. The Court was quick to point out that the strength of the presumption should vary with time, and that it lacked the vigour enjoyed in the days before marital property legislation. However, it was noted that, in this particular case, the litigation did not arise as a result of a separation of the spouses who were themselves also, of course, unable to testify. Mr. Justice Huband went on to point out that in this case, the husband was the major provider for the family, there was a good relationship and it was therefore

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[1] (1993), 88 Man. R. (2d) 51.

[2] "Recent Trust Cases" (1992) 21 Man. L.J. 133.

"entirely understandable that a loving husband should put assets in the name of his wife with the intent that they should be hers as gifts."[3] Since there was no evidence to rebut this presumption, he allowed the appeal and dismissed the claim of the husband's estate.

One other point, which the Court of Appeal discussed, was that the learned trial judge had made the award to the husband's estate on the basis of a constructive trust of the modern type described in the celebrated case of *Pettkus* v. *Becker*.[4] As we pointed out in our previous commentary[5], this seemed a little strange as the whole case appeared to turn on whether there had been a traditional resulting trust and it had been so argued by counsel. The Court of Appeal stated very clearly that the case should be decided as argued, but as they had already decided that a presumption of advancement applied, the question of the resulting trust did not need any further discussion.

The next interesting case decided by the Court of Appeal during this past year was *Hill Estate* v. *Chevron Standard Ltd.*[6] Here again, there was a discussion of trusts implied by law but interestingly enough, not of the type between husband and wife so common in family law. It is encouraging to observe the doctrine being argued in other situations. This serves as a reminder that the constructive trust, despite modern developments, should not be solely identified with family disputes.

While the case contained several interesting legal issues, the main one so far as the law of trusts is concerned centered around whether Chevron Standard Ltd. could have the remedy of a constructive trust where its lease of certain mineral rights in land had been declared void. Briefly, the facts (which were basically not in dispute) were that the original owner (Hill) of certain land (under which oil was discovered) in southern Manitoba had become physically and mentally handicapped as a result of being stranded in his car in a blizzard. While he was confined to a nursing home, he signed a power of attorney (by making the mark of X) in favour of his wife who knew he was mentally incompetent. Shortly after executing this power, Hill died. The Court of Appeal, which reversed the decision of the trial

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[3] *Supra* note 1 at para. 34.

[4] [1980] 2 S.C.R. 834.

[5] *Supra* note 2 at 134.

[6] [1993] 2 W.W.R. 545.

judge,[7] held that this power of attorney, was in the circumstances, wholly void and not simply voidable, and therefore all acts done under it were void. The lease of the mineral rights, executed by his wife in favour of the oil company, was therefore also void.

Counsel for Chevron Standard Ltd. contended that if the lease were declared void then the circumstances would constitute an unjust enrichment for which a constructive trust was the appropriate remedy. Counsel went on to argue that it would be manifestly inequitable to permit the widow and the beneficiary under the deceased owner's will or those claiming through or by her, to reacquire the very interests which she improperly purported to bargain away on her husband's behalf. It was therefore argued that a constructive trust be imposed on the deceased's estate in order to prevent unjust enrichment.

The Court of Appeal cited the three requirements set out by Dickson J. (as he then was) in *Rathwell* v. *Rathwell*[8] for a constructive trust remedy: an enrichment, a corresponding deprivation and the absence of any juristic reasons for the enrichment. Clearly in this case the Court said there had been an enrichment and a deprivation but was there a juristic reason? This phrase had not really been clearly explained in the *Rathwell* v. *Rathwell* case, nor, in any detail, in the many family law cases which had followed it. The Court of Appeal was therefore, to some extent, breaking new ground when it attempted an explanation of these rather familiar words. Mr. Justice Huband said:

> It simply comes down to this: if there is an explanation based upon law for the enrichment of one at the detriment of the other, then the enrichment will not be considered unjust and no remedy, whether by constructive trust or otherwise will be available. For example, there might be a contract between the parties under the terms of which an enrichment by one at the expense of the other is contemplated.[9]

He then went on to say that, since the original lease was void, Chevron Standard Ltd. had no leave or licence from Hill to deal with his mineral holdings. Therefore, in proceeding without valid legal authority, Chevron Standard Ltd. provided the juristic reasons for the enrichment which could not therefore be regarded as unjust. The claim for a remedial constructive trust therefore failed. Mr. Justice Huband went on to add that, even if an unjust enrichment were

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[7] See C. Harvey's comments in "Agency and Mental Incompetence" (1992) 21 Man. L.J. 146.

[8] (1978), 83 D.L.R. (3d) 289.

[9] *Supra* note 6 at 70.

established, a constructive trust, as sought by Chevron Standard Ltd., would be a remedy too sweeping and an award *quantum meruit* would be a more equitable remedy.

Whatever might be the merits of this case, it is encouraging to see a Canadian court observing, so strictly, the limits imposed originally by the Supreme Court of Canada on the granting of the comparatively new constructive trust remedy. It has always been the view of this writer that Canadian courts might be carried away by this new remedy into extending it to areas where the court might feel some kind of injustice had occurred. This is what has prevented the old constructive trust from being extended in England, and clearly Chief Justice Dickson was careful to set out the above three constraints in Canada, so that the remedy might be exercised only in accordance with clearly defined criteria.

The third and final case does not concern trusts arising by operation of law but is rather an interesting decision on when the Court will allow variation of a trust under s. 59 of the *Trustee Act* of the province.

In the *Matter of the Estate of Jean Christine Henderson*[10] the beneficiary of the life interest in the residue of an estate applied to terminate the trust. The application arose as a result of a will made by Jean Christie Henderson, a widow, whereby she bequeathed the life interest in the residue of the estate to her daughter, Nancy (the applicant in the present proceedings) with the remainder to be divided between the children of Nancy to be paid out at certain ages under the terms of the will. When Mrs. Henderson died in 1961 there were then living Nancy, and her two sons John and Dennis. The estate at the time of this application was well over $200,000, and Nancy was 59 years of age and the two sons 37 and 34 years of age respectively. Neither of the two sons were married and they both stated that they did not intend to have children. Nancy stated that she was past child bearing and, in any event, had no intention of bearing children. Nancy disclaimed her life interest and the two sons now assigned their interests in the remainder of the estate to their mother.

Now all the family wanted to wind up the estate by terminating the trust for several reasons; but chiefly so as to avoid capital gains tax which would arise pursuant to the 21-year deemed disposition rule under the *Income Tax Act*. It was estimated that if the estate were not wound up, then tax would take approximately one half of its value amounting to over $100,000.

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[10] (1992), 77 Man. R. (2d) 91 (Q.B.).

The applicant asked for termination under s. 59(3) of the *Trustee Act*[11] on the basis that since all the beneficiaries were of full age and absolutely entitled they could obtain such termination under the old rule in *Saunders* v. *Vautier*[12] which has now been modified by this section requiring the approval of such termination by the Court. Such a proposal by the Court is normally obtained fairly easily if the arrangement appears to be of a justifiable nature. However, in this particular case the Public Trustee appeared in order to oppose the termination of the trust on the basis that the arrangement fell under s. 59(5) of the *Trustee Act* which requires the applicant to obtain the approval of the Court of a variation of a trust where unborn contingent beneficiaries are involved.

The Public Trustee argued that there were two classes of potential beneficiaries: first, the possible further children of Nancy and secondly, the possible unborn grandchildren of Nancy who might survive their father and thereby become entitled to an interest in the residue. Counsel for the applicant argued that there were no unborn contingent interests and in any event those contingent interests were so remote that the Court should disregard them in granting the application.

The Court accepted the argument of the Public Trustee with regard to both the classes of potential contingent beneficiaries. While one can understand this with regard to the second class of potential grandchildren, it is with regard to the first claim of unborn children of Nancy aged 59 years that the old example of the fertile octogenarian under the Perpetuity Rule comes to mind with a smile. Will the old presumptions that no woman is deemed past child bearing never be replaced by the advance of medical knowledge?

In the circumstances the Court had to go on to consider whether, in order to grant this application to vary there was some benefit to the unborn potential beneficiaries. Subsection (a) of s. 59(8) of the *Trustee Act* provides:

> ... an arrangement in respect of a trust is for the benefit of a person:
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> > (a) if it would enhance the financial, social, moral or family well being of that person;
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> > ....

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[11] R.S.M. 1987, c. T160.

[12] (1841), 41 E.R. 482 (Ch.D.).

The learned judge cited several cases on this issue from other Canadian provinces since, strangely enough, there appears to be no Manitoba case on this particular section of our Act. One of the most recent cases which he cited with approval was *Re Kovish*[13], a decision of Madam Justice Proudfoot of the British Columbia Supreme Court where, approval of a variation on behalf of potential unborn beneficiaries was granted on the basis that the word benefit should be given a large and liberal interpretation.

In the case at bar therefore, the learned judge had no hesitation in holding that if the estate were diminished by one half, then the interest of the unborn beneficiaries would be significantly adversely affected and thus he granted the application to vary under s. 59(5) of the *Trustee Act*.

This was clearly a reasonable decision in the light of the heavy loss which would have been suffered by the estate if there had been no variation, bearing in mind the high degree of improbability of there being contingent beneficiaries actually likely to inherit. However one is left wondering why an out of court settlement could not have been reached as suggested by the learned judge in view of all the circumstances. The Public Trustee had, of course, to put forward the possibility of the unborn potential beneficiaries, but having done so, one would have thought, it should not have been necessary to incur all the extra costs of the litigation which then took place.

[13] (1985) 18 E.T.R. 133.